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No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

UNITED STATES OF AMERICA

v.

GEORGE SCHELL,

Petitioner

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

THEODORE SIMON
Suite 2400, Architects Building
117 South 17th Street
Philadelphia, Pennsylvania 19103
(215) 563-5550
Counsel for Petitioner Schell

THE LEGAL INTELLIGENCER, 10th & SPRING GARDEN STREETS, PHILA., PA. 19123 (215) 236-2000

QUESTIONS PRESENTED

1. Is Petitioner denied due process, a fair trial and an opportunity to present a defense in a trial founded upon a Government orchestrated proactive investigation where the district court prohibits the introduction of unused and intact tangible evidence which by the Government's theory of prosecution should not even exist; limits defense expert testimony; inhibits the Petitioner's right to testify; and fails to comply with minimal standards for establishing the competency of Government videotape evidence.

2. Whether the delay in trial of the Petitioner violated the Mandate of the Speedy Trial Act of 1974 to his prejudice.

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2. The delay in trial of the Petitioner violated the Mandate of the Speedy Trial Act of 1974 to his prejudice.

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v.

GEORGE SCHELL

Petitioner,

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court:

Petitioner, by his counsel, Theodore Simon, petitions for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINION BELOW

In the United States District Court, although no opinion was filed, a Motion for Judgment of Acquittal was denied, and the Court imposed a judgment of sentence from which direct appeal was taken to the Court of Appeals.

The Judgment Order of the Court of Appeals was issued on January 7, 1983 and is as yet unreported.

JURISDICTION

A Judgment of sentence was imposed by the United States District Court from which direct appeal was taken to the Court of Appeals. Judgment of the Court of Appeals was entered without opinion, on January 7, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 Paragraph 1.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The Fifth Amendment to the United States Constitution provides in pertinent part:

> "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived or life, liberty, or property, without due process of law."

The Speedy Trial Act, 18 U.S.C. §3161, provides in pertinent part:

"§3161. Time limits and exclusions

(h) The following periods of delay shall be excluded in computing the time within which an information

or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:

> (4) Any period of delay resulting from the fact that the defendant is mentally incompetent or physically unable to stand trial.
>
> (8) Any period of delay resulting from a continuance granted by any judge on his own motions or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interest of the public and the defendant in a speedy trial.

STATEMENT

This case is a prime example of the Government's creation of a quasi-criminal business enterprise to entice individuals into engaging in illegal activity.

Petitioner, GEORGE SCHELL, has been charged and convicted of conspiracy to manufacture phenyl-2-propane (P-2-P) and methamphetimine, both schedule II Controlled Dangerous Substances, and possession,

with the intent to distribute methamphetimine, in violation of 21 U.S.C. §841(a)(1) and §846. He has been sentenced to incarceration of four years on each charge, the sentence to run concurrently.

In December of 1980, Special Agent Joseph Vigna began operation, in an undercover capacity, of the J.B.R. Chemical Company. This company, which was the sole creation of the government, advertized and sold legal chemicals and equipment that could be utilized in the manufacture of both legal and illegal substances.

Unknown to customers, the sales office of the J.B.R. Company was equipped with a hidden videotape machine, which could be activated solely by Agent Vigna whenever *he* suspected a customer of illegal intent in his purchase of chemicals or equipment.[1]

The Government's primary evidence at trial consisted of videotapes of the Petitioner and/or his co-defendant, Samuel Allen, at their meetings with Agent Vigna.

Agent Vigna operated the videotape devices on seven separate occasions at which the Petitioner and/or Samuel Allen were present in the J.B.R. sales office. However, in only three instances was an entire, intact recording of the visit obtained. These were made available to the defense during pre-trial discovery proceedings. On the four other occasions, the videotape machine either failed to operate at all; recorded separate visits on the same portion of tape rendering the images unintelligible; recorded only parts of the meeting; or a tape which seemingly never existed was only "discovered" before trial after the defense questioned the integrity of the tapes.

However, in spite of Agent Vigna's poor record in the operation of the videotape machine and the creation and preservation of the videotapes themselves, the Gov-

1. This investigation was the "brainchild" of Agent Vigna and it was initially opposed by his superiors.

ernment was permitted to introduce at trial any intelligible portion of the videotapes.

The first contact between Petitioner, Allen, and Agent Vigna was on December 3, 1980 when Mr. Allen called the J.B.R. Chemical Company. It concerned Mr. Allen's attempt to purchase Ephedrine Hydrochloride, a non-controlled substance with numerous legal uses. By stipulation, the Government agreed its purchase was not in violation of the law.

A meeting on December 4, 1980, was videotaped in its entirety. This meeting between Agent Vigna and Messrs. Schell and Allen concerned the purchase of ephedrine and of phenylanaline, another legal chemical used as a dilutant. Petitioner and Allen emphasized during the meeting that they had no intention of engaging in illegal activity.

At a second meeting on December 11, 1980, only Agent Vigna and Allen were present. No videotape of this exists because of a mysterious malfunction in the equipment. This meeting is the only time allegedly inculpatory statements were made. According to Agent Vigna's testimony Allen purportedly confessed to the manufacture of P-2-P and described his chemist.

A third meeting on January 9, 1981 between Agent Vigna and Messrs. Schell and Allen was videotaped in its entirety. At that time Petitioner and Allen purchased more ephedrine and ordered other legal chemicals and equipment. Agent Vigna also attempted to induce Messrs. Schell and Allen to purchase other chemicals necessary for the manufacture of controlled dangerous substances. Petitioner and Allen resisted these efforts to have them purchase the "needed" chemicals and indeed *did not* purchase them.

A fourth meeting on January 23, 1981 was only partially videotaped. Also, the Government denied this tape's existence throughout pre-trial discovery proceedings and the tape was not made available to the defense at that time. Again, in spite of further urgings by Agent

Vigna, Petitioner and Allen insisted they were not in production of illegal chemicals and they resisted purchasing necessary ingredients from Vigna to produce same.

A fifth meeting on January 29, 1981 between Vigna, Schell and Allen was videotaped in its entirety. Petitioner and Allen again insisted that they were not producing illegal chemicals and, more importantly, they again resisted Agent Vigna's urgings to purchase chemicals and equipment necessary to do so. While the parties do discuss the purchase of Sodium acetate, a necessary ingredient of P-2-P, none was obtained from Vigna until May 1, 1981 and the purchased chemical was found, intact, in the trunk of Allen's car at the time of his arrest on May 4, 1981.

Two last meetings were held between Agent Vigna and Allen on May 1, and May 4, 1981. The videotapes of these meetings were unintelligible because both meetings were taped on the same portion of videotape. Petitioner was not present at either of these meetings when Allen picked up supplies of ephedrine and sodium acetate.

Besides the inconclusive evidence of the mishandled videotapes, the Government also presented the testimony of William Reich, an alleged co-conspirator.[2] Reich, who was neither indicted nor charged, not only described his alleged association with Petitioner and Allen, but also his separate and distinct manufacturing operation of controlled dangerous substances which included only others. Reich testified that he and Schell entered into an agreement whereby Schell would provide the necessry chemicals for the production of methamphetamine by Reich.

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2. Reich testified only in return for a grant of immunity for his wife, support for a sentence reduction for himself and admission into the witness protection program. He had admitted to a cellmate that he was testifyng falsely only for these reasons. In fact Reich had previously described others *not* Schell as his accomplices.

The thrust of the defense was to reveal the incompetency of the Government's evidence, i.e. the videtapes, and its expert conclusion founded upon such evidence that the Petitioner and Allen were in production of controlled dangerous substances or that they had the expertise, based on their own admission on the tapes, to produce controlled dangerous substances.

Consequently, the first defense witness, was Phillip Livingston, the expert videotape engineer hired by the Government to examine the questionable videotapes. He testified that the defects in the videotapes could not have been caused in the manner described and alleged by Agent Vigna.

Other evidence crucial to the defense was produced but was denied admission by the trial court. This included, most significantly, the testimony of two eminently qualified chemical experts who would have testified that Petitioner and Allen neither had the capacity or expertise to produce the controlled dangerous substances as charged. These conclusions, even though founded on the experts review of the videotapes, testimony and other information in the record, were not permitted to be presented to the jury.

Most significantly, the defense was not permitted to present the very chemicals and equipment obtained from the J.B.R. Chemical Company which *remained unused and intact* until their examination by a defense expert. The trial court would not permit the introduction into evidence of such chemicals and equipment without the testimony of Petitioner and held, *sua sponte*, that should the Petitioner testify, he could be impeached by the Government with his prior record. This action was taken by the court even through the Government itself had not intended to use Mr. Schell's prior record for impeachment purposes.

While trial of this matter was originally set for September 21, 1981, it was delayed, without the consent of Mr. Schell, to November 30, 1981 by the district court's

sua sponte directive on September 16, 1981, that Mr. Schell undergo a psychiatric evaluation. Mr. Schell objected to such an evaluation and the delay it would cause. He also made multiple applications to the court, both before and after September 21, 1981, for an immediate trial.

The psychiatric evaluation, once obtained, established without question that Mr. Schell was and had always been mentally competent.

REASONS FOR GRANTING THE WRIT

I. Petitioner is denied due process, a fair trial and an opportunity to present a defense in a trial founded upon a Government orchestrated proactive investigation where the district court prohibits the introduction of unused and intact tangible evidence which by the Government's theory of prosecution should not even exist; limits defense expert testimony; inhibits the Petitioner's right to testify; and fails to comply with minimal standards for establishing the competency of Government videotape evidence.

At a time when Government orchestrated pro active investigations are ever increasing, and where they are premised upon the Government's unilateral creation and control of the "evidence" through highly technical means under the sole control of Government agents, the question is squarely presented whether traditional, restrictive and individualistic evidentiary rulings should be eased.

In the context of these types of investigations either the effect of such restrictive rulings must be eased, and/or more definitive guidelines must be announced to safeuard the time honored right of a defendant to a fair

trial, due process and an opportunity to present a defense.

Four factors in this investigation and prosecution mandate such a consideration:

A. The at best gross incompetency demonstrated by the Government agent involved in the creation and preservation of crucial videotape evidence;

B. The trial court's refusal to admit unused tangible evidence which by the Government's own theory of prosecution should not even exist;

C. The trial court's *sua sponte* instruction to the government that if the Petitioner testified on his own behalf he could be impeached by a prior record; and

D. The trial court's refusal to permit defense experts to testify that on the basis of the evidence presented the Petitioner did not have the knowledge or capacity to produce the controlled dangerous substance as charged.

The cumulative effect of these factors, particularly in the context of this case, rendered the trial fundamentally unfair and denied Mr. Schell due process. *Chambers v. Mississippi*, 410 U.S. 284 (1973).

A.

As a precondition to the admission into evidence of videotape evidence, several criteria must normally be met:

> (1) the recording device was capable of taking testimony; (2) the operator was competent; (3) the recording was authentic and correct; (4) no alterations were made; (5) the recordings were properly preserved; (6) the speakers were identified; and (7) the testimony was voluntarily given.

See, for example, United States v. Starks, 515 F2d 112 (3rd Circuit 1975).

The seven meetings between Mr. Schell, his co-defendant and Agent Vigna constitute the primary evidence against the defendants. Yet the majority of the videotapes of these meetings — which were made *seriatem* on several tapes — were either mishandled or lost. Only three meetings were actually videotaped in their entirety without some degree of incompetency interferring with their accuracy.

B.

But the failure of the Government Agent to obtain such results *in the majority* of his attempts to do so not only renders them all suspect in the overall context of this case, but also skews the truth-finding process directed against this episode.

Thus, while herein the Government was permitted to use unusually incomplete evidence, Mr. Schell was denied the opportunity to complete the less than accurate view portrayed in the videotapes with other competent evidence. Particularly, he was not permitted to show that all chemicals and equipment referred to in the tapes remained *intact and unused* at the time of Allen's arrest on May 4, 1981.[3]

Thus an offer of proof was made to establish a legally sufficient chain of custody from the time of the deposit of these items in a storage locker to their subsequent retrieval by independent investigators and delivery to an expert witness. See, *United States v. Johnson*, 637 F2d 1224 (9th Cir. 1980); *United States v. Cyphers*, 553 F2d 1064 (7th Cir. 1977); *United States v. Goichman*, 547 F2d 778 (3rd Cir. 1976). However, the district court held that unless Mr. Schell, himself, testified as to the time period between delivery and retrieval the court would not admit evidence that the items remained intact and unused in their original packaging.

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3. The Government's prosecutorial theory was that these items were *used* in the manufacture of controlled dangerous substances.

This action by the district court prevented the introduction of relevant evidence crucial to the defense and critically impeded Mr. Schell's ability to respond to the charges before the jury.

C.

Moreover, while Mr. Schell wished to testify on his own behalf, especially because the Government did not intend to use his prior record to impeach him, the district court, *sua sponte*, stated that it believed the Government could use Schell's prior record for impeachment. These comments and holdings of the trial court substantially inhibited the exercise of Mr. Schell's right to testify. In fact, as a direct result of the Court's ruling, Mr. Schell could not and did not testify. The court would not permit counsel to establish a chain of custody without Mr. Schell's testimony but almost simultaneously held that if he did testify he was subject to being confronted with his prior record not only to impeach his credibility but also as substantive evidence of his intent.

D.

Mr. Schell was further deprived of an opportunity to present a defense to the Government's charge by the district court's refusal to admit critical expert testimony for the defense.

Mr. Schell contended that the videotapes demonstrate that he neither had the knowledge nor the ability to act as charged, i.e., to manufacture a controlled dangerous substance. To establish this Mr. Schell wished to present the testimony of two highly qualified experts whose expertise was admitted by the Government.

Both experts reviewed the videotapes and Government testimony and both concluded that the items Mr. Schell received from Agent Vigna were not sufficient to manufacture methamphetamine or P-2-P. However, the experts were precluded from testifying that Schell had

neither the knowledge or capacity to manufacture methamphetamine or P-2-P.

This testimony was crucial to Mr. Schell's case. The district court's decision to reject such evidence constitutes a final denial of any opportunity to present a defense. In light of the prior rulings admitting the videotapes, denying admission of the intact chemicals and equipment, and precluding testimony by Mr. Schell himself, this ruling left Schell without any means to respond to the Government's allegations.[4]

The testimony of these experts would have permitted Mr. Schell to rebut the Government's truncated version of the videotape evidence. The refusal to admit these expert conclusions was the last adverse ruling which ultimately quelled the possibility of a fair trial with due process. Precluded from testifying on his own behalf, precluded even from introducing relevant tangible evidence, Mr. Schell was denied finally even an opportunity to present essential testimony in support of his defense.

The cumulative effect of these evidentiary and testimonial rulings constitute a systematic denial of Mr. Schell's right to a fair trial, due process and an opportunity to present a defense, particularly in the context of a Government orchestrated pro active investigation. where the exclusive means of creating and preserving evidence is left in the hands of a single agent whose competency is highly questionable.

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4. Ironically, the intact and unused chemicals and equipment was denied admission into evidence by the Court, whereas the mishandled and incomplete videotape evidence was not. Thus, the only evidence which would have given a full view of what occurred on the incomplete version of the videotapes was never admitted.

II. The delay in trial of the Petitioner violated the Mandate of the Speedy Trial Act of 1974 to his prejudice.

Mr. Schell was denied the speedy trial mandate of the Speedy Trial Act of 1974, 18 U.S.C. §3161, by the district court's *sua sponte* and unwarranted decision to require him to undergo a psychiatric examination.

The factual basis of this denial was fully set forth in the Motion for Dismissal.

(1) The Complaint was filed before Magistrate Cowen on May 5, 1981.

(2) The instant indictment was returned on May 13, 1981.

(3) The Defendant entered a plea of "not guilty" on May 21, 1981.

(4) Trial date was set for September 21, 1981.

(5) On September 14, 1981 the Court ordered the hearing on suppression of the video tapes to begin on September 17, 1981.

(6) On September 16, 1981, rather than have the suppression hearing begin, the Court, *sua sponte*, ordered the defendant committee pursuant to 18 U.S.C.A. §4244. The defendant was remanded to custody.

(7) Notwithstanding the continued willingness of the defendant to proceed with the suppression hearings and trial without counsel, the Court did not begin the hearing on September 17, 1981, as scheduled.

(8) On September 17, 1981, defendant's prior Attorney, Jerrold Kamensky, Esq., filed a notice of appearance reinstating his position as attorney for the defendant. Nonetheless, neither the trial nor the hearings began.

(9) On September 23, 1981 motions were filed to, among other things, seek an expeditious trial pursuant to 18 U.S.C.A. §3161. No trial date was set.

(10) On October 12, 1981, Dr. Charles D. Semel wrote to the Court indicating that the defendant suffered

no disabilities which would render him incompetent in any way. Still no trial date was set.

(11) Notwithstanding the defendant's continued efforts to have his trial begin as soon as possible and despite his repeated requests for the same as evidenced by his request of September 17, 1981 on the record and the motion filed on September 24, 1981, trial had not yet begun.

(12) Trial had not commenced within the 70-day trial period as required by 18 U.S.C.A. §3161.

(13) The defendant has been severely prejudiced by the delay. In particular, defendant was notified on or about October 5, 1981, that the Government had "discovered" the alleged laboratory that they asserted was used by the defendant for the manufacture of C.D.S. Similarly, the disclosure of an additional co-conspirator was not made until October 7, 1981.

It must be reiterated that the district court's doubts as to Mr. Schell's mental competency are without support in the record.[5] Nor did the court set forth any reasons for its decision.

Furthermore, this petition is specifically founded upon the court ordered exclusion for delay made pursuant to 18 USC §3161(h)(4). Examination of this order reveals no mention or reference to 18 USC §3161(h)(8)(A) as its statutory foundation, while the hearing notes are likewise devoid of the articulated findings necessary to a 18 USC §3161(h)(8)(A) delay exclusion. Therefore, any reliance upon 18 USC §3161(h)(8)(A) must fail on two grounds; 1) the court order itself was not based on that statutory section; and

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5. Indeed the defendant asserted he was not mentally incompetent either prior to, at the time of or subsequent to the court ordered mental examination. The Court ordered examination report filed with the District Court on October 12, 1981, diagnosed the defendant as a "healthy young man", finding him "to be psychiatrically sound, suffering from no psychiatric illness and competent within those tests of competency as set forth by the law."

2) the comcomitent articulated findings, on the record, necessary for a 18 USC §3161(h)(8)(A) delay exclusion are absent.

The sactions set forth in the Speedy Trial Act of 1974 are clear and unequivocal:

> "If a defendant is not brought to trial within the time limit required by section 3161(c) as extended by section 3161(h), the information or indictment shall be dismissed on motion of the defendant." 18 USC §3162(a)(2).

This section applies to the instant case as it commenced after July 1, 1980. 18 USC §3163(c). There was no basis for ignoring its mandate.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

Theodore Simon, Esquire
Counsel for Petitioner

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-5146

UNITED STATES OF AMERICA

v.

SCHELL, GEORGE,

Appellant

Appeal from the United States District Court
for the District of New Jersey
(D.C. Crim. No. 81-00177-02)
District Judge: Honorable Herbert J. Stern

Submitted Under Third Circuit Rule 12(6)
January 6, 1983
Before: ALDISERT, GIBBONS, and HIGGINBOTHAM,
Circuit Judges.

JUDGMENT ORDER

After considering the contentions raised by appellant, to-wit, that: (1) the district court imposed three unreasonable and improper limitations on the presentation of the defendant's case: restrictions on the scope of defendant's expert testimony; prohibition of relevant tangible evidence; and inhibition of defendant's right to testify. Taken individually or cumulatively, defendant's right to a fair trial was violated; (2) the delay in trial of the defendant violated the mandate of the Speedy Trial Act of 1974 to the prejudice of the defendant; and (3) the district court improperly interpreted the requirements of *United States v. Starks*, 515 F.2d 112 (3d Cir. 1975), by ruling that the government has fulfilled its burden of proving the competency of the videotapes when the evidence showed that in four out of seven conversations, errors were made which demonstrates that the *Starks* criteria were not met; it is

ADJUDGED and ORDERED that the judgment of the district court be and is hereby affirmed.

BY THE COURT,

ALDISERT

Circuit Judge

Attest:

SALLY MVROS

Sally Mrvos, Clerk

Dated: January 7, 1983

IN THE
UNITED STATES DISTRICT COURT
For the District of New Jersey

UNITED STATES OF AMERICA

v.

GEORGE SCHELL

JUDGMENT AND PROBATION/COMMITMENT ORDER

(O)n this date, February 3, 1982 . . . (t)here being a verdict of guilty. Defendant has been convicted as charged of the offense of Conspiracy to Manufacture and Possess Methamphetamine and Travel Act Violations. . . . The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of four (4) years on Count I and four (4) years on Count II to run concurrently . . .

/s/ Herbert J. Stern
United States District Judge